Supreme Court, U.S.
FILED
MAR 2 - 2004
OFFICE OF THE CLERK

(6)

No. 03-1037

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.* MEMBERS OF THE NEVADA STATE ASSEMBLY AND NEVADA STATE SENATE, *et al.*

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington D.C. 20002

HUGH HEWITT
STEVEN B. IMHOOF
HEWITT & O'NEIL LLP
19900 MacArthur Blvd.,
Suite 1050
Irvine, CA 92612

JOHN C. EASTMAN
Counsel of Record
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. This Case Is Not Moot or, Alternatively, Easily Falls Within Well-Established Exceptions to Mootness 1

A. The State Assembly Already Twice Violated the 2/3 Vote Provision of the Nevada Constitution. 1

B. "Voluntary Cessation" Analysis Is Appropriate Where, as Here, the Legislature Fights To Uphold the Nevada Court's Decision "Authorizing" Unconstitutional Conduct. 2

C. This Is a Classic Case of the "Capable of Repetition Yet Evading Review" Exception to Mootness. 4

II. The Federal Questions Were Adequately and Timely Presented Below. 7

III. Whether a State Court's Blatant Disregard of Its Own Constitution Should Result in Justiciable Federal Claims Should Be Addressed by this Court. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Angle v. Legislature,
No. 03-16326 (9th Cir.) 8, 9

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 10

Bouie v. City of Columbia,
378 U.S. 347 (1964) 10

Brinkerhoff-Faris Trust Co. v. Hill,
281 U.S. 673 (1930) 8

Davis v. Bandemer, 478 U.S. 109 (1986) 10

Fed'n of Adver. Indus. Rep's, Inc. v. City of Chicago,
326 F.3d 924 (7th Cir. 2003) 3

Great Northern R. Co. v. Sunburst Oil & Refining Co.,
287 U.S. 358 (1932) 8

Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 10

Moore v. Ogilvie,
394 U.S. 814 (1969) 5

Mosley v. Hairston,
920 F.2d 409 (6th Cir. 1990) 3

N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) 3

Preiser v. Newkirk,
422 U.S. 395 (1975) 3

Spencer v. Kemna,
523 U.S. 1 (1998) 5

Super Tire Engineering Co. v. McCorkle,
416 U.S. 115 (1974) 4, 7

United States v. W. T. Grant Co.,
345 U.S. 629 (1953) 3

Statutes, Bills, and Constitutional Provisions

Nev. Const. Art. 11, § 6 9
Nev. Const. Art. 4 § 16 2
Nev. Const. Art. 4 § 17 2
Nev. Const. Art. 4 § 23 2
Nev. Const. Art. 4, § 18(1) 8
Nev. Rev. Stat. § 293.12755 6
Nev. Rev. Stat. § 293.175 6
Nev. Rev. Stat. § 293.177 6
Nevada Senate Bill 5 (2003 session) 1, 2, 3, 4
Nevada Senate Bill 6 (2003 session) 1, 3, 4
U.S. Const. Amend. XIV, § 1 7
U.S. Const. Art. IV, § 4 7

Other Authorities

ERWIN CHEMERINSKY, FEDERAL JURISDICTION (4th ed. 2003) 3, 5, 7
Editorial, Reno Gazette-Journal 9 (Oct. 3, 2003) 6
Ray Hagar, "Some School Districts Struggle with Overload," Reno Gazette-Journal A8, 2004 WL 57372782 (Feb. 1, 2004) 4
Cy Ryan, "Ralliers Plan to Speak Against Tax Foes," Las Vegas Sun 1, 2003 WL 62391597 (Oct. 31, 2003) 6
Rod Smith, "Gaming Contributions: Political Gamble," The Las Vegas Review-Journal 1D, 2003 WL 4734475 (Feb. 9, 2003) 6
Ed Vogel, "GOP has high election hopes," The Las Vegas Review-Journal 1B, 2004 WL 61418357 (Jan. 12, 2004) 6

INTRODUCTION

Governor Guinn, the lead respondent here and petitioner below, has not opposed the petition for a writ of certiorari; indeed, he has previously disavowed the ruling below in the parallel federal court action. At the very least, then, this Court should call for a response from the lead respondent whose own petition for a writ of mandamus triggered the unlawful remedy he now disavows.

But the Legislature—or, more precisely, the Legislative Counsel, as we are aware of no act of the Legislature authorizing the filing of its brief—has weighed in to *oppose* this Court's review of a decision rendered *against* it. It makes every argument in the book to *defend* the adverse decision and also to prevent this Court from even considering that extraordinary order.

If anything, the Legislature's insistence on defending a judgment that was adverse to it, but which freed it from a concededly constitutional restriction on its own ability to raise taxes, should highlight the necessity of this Court's review.

I. This Case Is Not Moot or, Alternatively, Easily Falls Within Well-Established Exceptions to Mootness

A. The State Assembly Already Twice Violated the 2/3 Vote Provision of the Nevada Constitution.

As Petitioners have previously noted, the Nevada Assembly already deemed as "passed" two bills—SB5 and SB6—increasing taxes without the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution. The vote-dilution harm to Petitioners caused by that constitutional violation has already occurred and continues as long as the decision "authorizing" such conduct remains on the books.

The Legislature makes three points in opposition. First, it contends that because SB5 and SB6 never became law, there was no unconstitutional action by *the Legislature* as a whole. Opp. 12. Second, and somewhat relatedly, it contends in a

footnote that because different versions of SB6 were approved by the Senate and the Assembly, the bill "*could* have been referred to a conference committee" and a new compromise bill "*could* have then been approved in both houses by a two-thirds vote." Opp. 7 n.6 (emphasis added). Finally, and perhaps most extraordinarily, the Legislature contends in another footnote that the Assembly's approval of SB5 without a 2/3 vote did not violate the Nevada Constitution because it "did not have the effect of increasing the overall revenue to be raised by SB6," which had already been deemed "passed" without a 2/3 vote. Opp. 9 n.7.

While intriguing, none of these contentions is correct, nor sufficient to render this case moot. The 2/3 vote requirement applies to "*each house*" of the Legislature, not just the Legislature as a whole, and it applies to "*all bills*," not just "bills" that become "law." *See also* Art. 4 § 16 ("Any *bill* may originate in either House of the Legislature") (emphasis added); *compare id.*, Art. 4 §§ 17, 23 ("Each *law* enacted by the Legislature shall embrace but one subject"; and "no *law* shall be enacted except by *bill*") (emphasis added). In other words, the constitutional vote requirements apply to *bills* at each stage of the legislative process, not just to the *law* finally approved at the end of the process. Not surprisingly, the Legislature cites no authority for its astounding proposition, and its own treatment in footnote 7 of SB6—passed without a 2/3 vote—as setting a new tax baseline to legitimize the Assembly's passage of SB5 without a 2/3 vote contradicts its own contention. Indeed, if SB6, a mere "bill," is sufficient to set a new tax baseline, then it was sufficient to trigger the constitutional 2/3 vote requirement, and retains sufficient vitality to prevent mootness.

B. "Voluntary Cessation" Analysis Is Appropriate Where, as Here, the Legislature Fights To Uphold the Nevada Court's Decision "Authorizing" Unconstitutional Conduct.

Even if one of the Legislature's tortured theories were sufficient to nullify the Assembly's votes on SB5 and SB6 and thereby trigger potential mootness, two well-established exceptions to mootness would permit this Court's review. First, as Petitioners previously noted, voluntary cessation of unlawful conduct by a defendant will moot a case only if there is *no reasonable chance* that the defendant will resume its unlawful conduct. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.4, at 140 (4th ed. 2003).

The Legislature tries to avoid this substantial hurdle by contending that it does not apply to governmental actors. Opp. 14-15 (citing *Fed'n of Adver. Indus. Rep's, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003); *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990); *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 677 (1993) (O'Connor, J., dissenting)). But this Court has never embraced such a lax "voluntary cessation" standard for governmental actors as the Legislature proposes. In *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975), for example, cited by the Legislature, this Court expressly noted that the case involved "more than a '[m]ere voluntary cessation of allegedly illegal conduct,'...where we would leave '[t]he defendant ... free to return to his old ways.'" Instead, this Court found that "there is now 'no reasonable expectation that the wrong will be repeated.'" *Id.* (citing *W. T. Grant Co.*). And *W. T. Grant*, in which the voluntary cessation exception to mootness was first articulated, was itself a case involving cessation by governmental actors.

Moreover, even if this Court were now to accept the deferential position taken by the 6th and 7th Circuits and suggested by Justice O'Connor's dissenting statement in the *Jacksonville* case, the Legislature is not entitled to such deference where, as here, it has not repudiated its unconstitutional actions but has instead steadfastly maintained that its actions were perfectly constitutional because sanctioned by

the decision below, and where it has vigorously fought to protect that decision. By going to such lengths to maintain on the books a decision that gives it continuing authority to ignore a structural impediment imposed on it by the people of Nevada, the Legislature has itself demonstrated that its "voluntary cessation" is not genuine. Indeed, the continuing vitality of the decision below casts just the kind of "continuing and brooding presence" over Petitioners that concerned this Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).[1]

This case thus involves more than mere speculation about the Legislature's future intent. Indeed, plans are already underway to impose new education-linked taxes. *See* Ray Hagar, "Some School Districts Struggle with Overload," Reno Gazette-Journal A8, 2004 WL 57372782 (Feb. 1, 2004) ("School trustees also said they are considering a bill-draft request for the Nevada Legislature to establish new tax sources to help fund school construction"). Negotiations over those taxes will continue to be effected by the Nevada court's ruling unless this Court grants review.

C. This Is a Classic Case of the "Capable of Repetition Yet Evading Review" Exception to Mootness.

The Legislature's contention that this case does not satisfy either prong of this well-established exception to mootness is simply misplaced, as Petitioners easily satisfy both prongs of the exception.

The Legislature first asserts that Petitioners "have not introduced any evidence demonstrating the 'reasonable likelihood' that the same putative misconduct will recur." Opp. 18. That standard, or the "reasonable expectation" standard

---

[1] The Legislature also cites a string of cases for the uncontestable proposition that the *repeal* of a statute renders a case moot. *See* Opp. 15 n. 12. Those cases are inapposite, as the Legislature never took any action to rescind the unlawful votes on SB5 and SB6, and the decision "authorizing" the unlawful votes is still on the books, as governing precedent.

actually articulated in *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998), is easily satisfied here. The Legislature's own actions demonstrate that it is bent on preserving the Nevada Supreme Court's "authorization" for it to ignore the 2/3 provision. Because those actions only make sense if the Legislature hopes to rely on that decision in the future, there is evidence enough to support Petitioners' contention that the unconstitutional conduct by the Legislature is reasonably likely to recur—or at the very least that Petitioners' expectation of a repeat performance by the Legislature is not unreasonable.

There has never been an evidentiary hearing in this case, so the Legislature's apparent insistence on direct "evidence" is a bit disingenuous, but the indirect evidence already offered by Petitioners is also more than adequate to demonstrate a reasonable likelihood or expectation of recurrence. As Petitioners noted in their opening brief, the Governor's *amici* below touted the fact that the stand-off between the forces for increased government spending and those opposed to increased taxes is "likely to recur" each legislative session, and Senator Dina Tutus—one of the Respondents represented in the Legislature's brief—has specifically noted that future taxes will "always be tied to the [education funding bill] because of" the ruling below. *See* Pet. 27.

Second, the Legislature contends that Petitioners have not introduced any evidence demonstrating that *they* are reasonably likely even to hold office for the next legislative session, much less oppose a tax measure or constitute greater than a one-third block of votes. Not surprisingly, the Legislature cites no authority for the added burden they would impose on Petitioners, and this Court's holdings in the arena of litigation by legislators are to the contrary. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (considering election law challenge under "capable of repetition" mootness exception where candidates *might* again seek access to the ballot); *see also* CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.3, at 133.

Moreover, even if the standard was as the Legislature claims, Petitioners clearly meet it. All 24 Petitioners have recently filed campaign finance disclosure reports indicating that they are already raising funds for next fall's primary and general elections.[2] Although not definitive yet—Nevada's filing period does not open until May 3, Nev. Rev. Stat. § 293.177—the mere fact that re-election committees have been formed and are raising money, combined with the fact that in Nevada (as elsewhere) incumbents are "statistically almost sure winners,"[3] is more than sufficient to demonstrate a reasonable likelihood or expectation that at least some of these legislators will hold office when the Legislature reconvenes next year.

Nor do these Petitioners need to prove that they will be sufficient in number during the next legislative session to block new tax measures, although given voter anger over the last tax increase—anger that has already launched a referendum drive to repeal the tax—there is certainly a "reasonable expectation" that these legislators, who opposed the tax increase, will be re-elected.[4] The dilution of their votes is alone sufficient to state a claim; the effect that vote dilution has already had on legislative negotiations is not just capable of repetition, but is in fact a continuing injury whenever the leg-

---

[2] The primary and general elections for state legislative offices in Nevada are September 7 and November 2, 2004, respectively. N.R.S. §§ 293.175, 293.12755. Most of Petitioners' most recent campaign finance reports are available on-line at http://sos.state.nv.us/contributions.asp (last visited March 1, 2004).

[3] Rod Smith, "Gaming Contributions: Political Gamble," The Las Vegas Review-Journal 1D, 2003 WL 4734475 (Feb. 9, 2003).

[4] *See, e.g.*, Cy Ryan, "Ralliers Plan to Speak Against Tax Foes," Las Vegas Sun 1, 2003 WL 62391597 (Oct. 31, 2003) (describing referendum and its basis in public anger "at the Legislature for approving the taxes"); Ed Vogel, "GOP has high election hopes," The Las Vegas Review-Journal 1B, 2004 WL 61418357 (Jan. 12, 2004); Editorial, Reno Gazette-Journal 9 (Oct. 3, 2003) ("It is widely expected that Nevada voters will retaliate at the ballot box against those who voted for new taxes").

islature is in session, as long as the decision below remains on the books, "authorizing" unconstitutional conduct by the Legislature. *See* Pet. App. 27a (noting the Legislature's admission below that the court's ruling effected legislative negotiations); *cf. Super Tire Eng. Co. v. McConkle*, 416 U.S. 115, 126-27 (1974) (holding that a challenge to a state law providing welfare benefits to striking workers was not moot once the strike ended because a court decision could substantially affect future labor-management relations); *see also* CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.2, at 131 (citing *Super Tire* as "particularly instructive").

The Legislature's contentions with respect to the evading review prong are also misplaced. By constitutional command (assuming that still means anything in Nevada), the Nevada legislature can meet only 120 days every other year. As Respondent Arberry noted in a separate brief he filed below, "budgetary bills are typically among the last bills to be enacted in most legislative sessions," "in the last week of the legislative session," would then quickly be enrolled and thus would, according to the Legislature, evade rule under the enrolled bill doctrine. Thus, not only would any controversy over new tax bills be "too short" in duration for adequate judicial review, it would be well short of the nine-month gestation period that led this Court in *Roe v. Wade* to find that abortion cases evaded review. *See* Opp. 19 n.17.

II. The Federal Questions Were Adequately and Timely Presented Below.

Inexplicably, the Legislature contends that Petitioners did not comply with this Court's Rule 14.1(g)(i). Yet Petitioners expressly stated that they "specifically raised the federal vote dilution, vote nullification, due process and Republican Guarantee Clause claims" in a petition for rehearing filed with the Nevada Supreme Court on July 21, 2003, and they included the entire petition for rehearing in their appendix, with specific reference to the pages at which the federal claims were raised. *See* Pet. 8 (citing Pet. App. 66a-73a).

Even if the Legislature meant only that Petitioners had not identified the way in which the Nevada Supreme Court "passed on" the federal questions presented, that contention is also erroneous. *See* Pet. 9 (noting that the Nevada Supreme Court "refus[ed] even to address, much less put to rest, Petitioners' significant federal claims").

If the Legislature instead meant only that the federal questions were not *properly* raised because asserted only in a petition for rehearing, Petitioners addressed this point as well. *See* Pet. 9 ("this Court has jurisdiction where, as here, the federal issues arose as the result of an unexpected decision by a state's highest court and petitioners therefore had no prior opportunity to raise the federal claims") (citing *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930)). In circumstances such as those presented here, the federal issues are timely raised, and will support the exercise of jurisdiction by this Court, *even if* the petition for rehearing is summarily denied without mention of the federal claims. *See Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932). Indeed, in the parallel federal action, the Legislature has contended that the *Rooker-Feldman* doctrine bars consideration of Petitioners' federal claims precisely because Petitioners' "presented their federal claims to the Nevada Supreme Court when they asked the court to reconsider its *Guinn* decision." Legislature Ans. Br. at 23, *Angle v. Legislature*, No. 03-16326 (9th Cir.).

Finally, the Legislature mischaracterizes the "apparent conflict" identified in the Nevada Supreme Court's July 1, 2003 order that supposedly should have led Petitioners to anticipate the extraordinary ruling below. That Order only made mention of the "apparent conflict between two provisions of the Nevada Constitution": Art. 4, § 18(1)'s provision that appropriations be passed by a simple majority, and Art. 4, § 18(2)'s provision requiring a 2/3 vote for tax increases. Order at 1. These are the "aforementioned provisions" whose apparent conflict the parties were directed to brief, not any

supposed conflict between Art. 4, § 18(2) and the education funding provision of Art. 11, § 6 on which the Nevada Court's ruling was based. And the Order itself directed the parties to identify "all available means" for resolving the impasse "so that the Legislature may fulfill its constitutional obligations." Nowhere in the Order, or in the Chief Justice's bench statement earlier that same day, is there even a suggestion that the court was considering the extraordinary remedy of directing the Legislature to ignore Art. 4, § 18(2).

Indeed, Governor Guinn, the petitioner below, repeatedly noted in the parallel federal action that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." Mot. to Dismiss 6, *Angle v. Legislature*, No. CV-N-03-0371 (D. Nev. 2003); *id.* at 9 (the Nevada Supreme Court "*independently* determined a conflict existed," that the 2/3 provision "must 'give way,'" and that "This determination was beyond any relief" sought).[5]

III. Whether a State Court's Blatant Disregard of Its Own Constitution Should Result in Justiciable Federal Claims Should Be Addressed by this Court.

The Legislature conjures a parade of horribles should Petitioners' Republican Guarantee or Due Process and Equal Protection claims be allowed to stand, but as the Pacific Legal Foundation *amicus* brief adequately demonstrates, there is no prospect that this will apply to routine constitutional interpretation cases rather than be reserved to extraordinary abuses of judicial power such as occurred here. Leaving state courts "free and unfettered" to interpret their own state con-

---

[5] Nor does the fact that the NSEA *amici* suggested below that the 2/3 vote provision was unconstitutional constitute sufficient notice that the Nevada Court was going to order the Legislature to ignore the provision *despite* its constitutionality. The Nevada Court "almost always refuses to consider issues not raised by a party." Opp. 22.

stitutions and laws does not require that this Court turn a blind eye to willful disregard of those constitutions and laws. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Nor does this case involve a political question of the sort that this Court declined to consider in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) and its progeny, as the *amicus* brief filed by the National Taxpayers Union, *et al*, amply demonstrates. Indeed, it is more than a little ironic to see the Legislature touting the "appropriateness of a political resolution of [its budget] controversy, as opposed to a judicial one," in a brief *defending* the state court's intrusion into that very political process.

The Legislature's reliance on the "enrolled bill rule," Opp. 28, to discount Petitioners' Due Process claims is not only unavailing but actually bolsters Petitioners' "evading review" contention. If, as the Legislature contends, final enrollment of a bill after passage "immunizes that act from attack on the basis of imagined or even real procedural irregularities," it is even more critical for this Court to address the Due Process violations now, before the real procedural irregularities already committed are repeated and then insulated from attack.

Finally, the Legislature mistakenly reads *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). *Davis* specifically recognized that vote dilution claims are justiciable even when "the characteristics of the complaining group are not immutable." *Id.* at 125. Moreover, *Davis* was a reapportionment case, so is inapposite. In *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986), decided the same year, this Court expressly suggested that a state official deprived of the effectiveness of his vote as determined by *state law* would have a vote dilution claim.

CONCLUSION

For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington D.C. 20002

HUGH HEWITT
STEVEN B. IMHOOF
HEWITT & O'NEIL LLP
19900 MacArthur Blvd.,
Suite 1050
Irvine, CA 92612

JOHN C. EASTMAN
Counsel of Record
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008

Counsel for Petitioners

Dated: March 2, 2004.